IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY,

Petitioners,

— against —

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, AND THE REPUBLIC OF THE PHILIPPINES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

CITATIONS

Constitution and Statutes:

Other United States Statutes and Regulations Cited

Legislative History

Reports

Other Authorities

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OPINIONS BELOW

The opinions of the Court of Appeals and the relevant opinion of the District Court in these cases are reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") and in the separate Appendix ("App.") as set forth in the Joint Brief for Petitioners ("Pet. Br.").

JURISDICTION

The jurisdictional requisites are set forth adequately in the Joint Brief for Petitioners.

QUESTION PRESENTED

Whether a foreign government is a "person" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. §15 (1970)?

STATUTORY PROVISIONS INVOLVED

The Clayton Act, Act of Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended:

Section 4.

> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
> 38 Stat. 731 (codified at 15 U.S.C. §15 (1970)).

Section 1.

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.
> 38 Stat. 730 (codified at 15 U.S.C. §12 (1970)).

STATEMENT OF THE CASE

The chronology of events contained in petitioners' statement of the case is essentially correct. As noted, the action of Vietnam, pending at the time of the Eighth Circuit decision has been dismissed. No. 77-1093 (8th Cir. June 15, 1977). Discussion of the District Court's opinion and a full discussion of the Eighth Circuit's opinion were omitted.

The Decision of the District Court

The question of a foreign government's standing to maintain suit first was raised in the Consolidated Broad Spectrum Antibiotics Actions in 1969, when the State of Kuwait filed a damage action in the U.S. District Court for the Southern District of New York. In ruling on petitioners' motion to dismiss the action for lack of standing, the District Court held that a foreign government is a "person" within the meaning of the antitrust laws:

> [T]he real question, as this Court perceives it, is whether the maintenance of this action is essential to the effective enforcement of the antitrust laws. The Court believes that it is and the motion will be denied.
> *In Re Antibiotic Antitrust Actions (State of Kuwait v. Chas. Pfizer & Co.)*, 333 F. Supp. 315, 316 (S.D.N.Y. 1971), App. A-5.

The District Court applied its holding and the *ratio decidendi* in the *Kuwait* action in holding that the plaintiff-respondent governments were "persons" under Section 4 of the Clayton Act. Pet. App. C, D, E.

The Decision of the Eighth Circuit

In affirming the decision of the District Court, the Court of Appeals for the Eighth Circuit sitting *en banc* and adopting *per curiam* the earlier opinion of its original panel, stated:

In view of the holding in *Evans* that Congress intended domestic state governments to have standing to sue for treble damages under the antitrust laws, we conclude that Congress intended other bodies politic, such as a foreign government, to enjoy the same right. There is certainly no indication of a contrary intent in the legislative history. In contrast to *Cooper*, no other provisions of the Act support the contention that Congress intended to exclude foreign nations. We find that the district court correctly held that foreign nations are "persons" under §4 of the Act entitled to sue for treble damages.
Pet. App. B-7.

SUMMARY OF ARGUMENT

A fundamental principle of law adhered to since the inception of this nation is that foreign governments have access to the courts of the United States. This principle rests on basic concepts of comity between nations. Indeed, provision for access is made in the Constitution, Art. III, §2, Cl. 1, and is supported by a line of cases decided both before and after the passage of the Sherman and Clayton Acts. In *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870), the Court declared "[a] foreign sovereign, as well as any other foreign person . . . may prosecute [its civil cause of action] in our courts." *Id.* at 167. The United States also has availed itself of concommitant rights in the courts of other countries.

Only in the most extreme cases have sovereigns been denied access to the courts of the United States. As this Court noted:

> [W]e are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States Courts.

> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).

The governing rule of statutory construction applied by this Court is that "[w]hen general rights are declared or remedies given by statute" a sovereign is presumed "to be included, though not named." BLACK, INTERPRETATION OF LAWS, 99 (2d ed. 1896); *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 228, 239 (1879). A state, foreign or domestic, otherwise would be placed in a position inferior to private suitors. To deny a foreign state access to pursue rights granted in the Sherman Act therefore would require an unequivocal expression of congressional intent. Not only is any such expression lacking in the language of Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), or in its legislative history, but the purpose of the Act and the context of its terms compel the conclusion that foreign countries have standing to sue under the antitrust laws.

In *Georgia v. Evans*, 316 U.S. 159 (1942), this Court recognized the right of government entities to be included as "persons" qualified to bring suit under the antitrust laws. The Court held that when states act solely as purchasers, they must have available the same civil remedies as are available to other commercial purchasers. Otherwise, a state would be denied "all redress . . . when mulcted by a violator of the Sherman Law, merely because it is a State." 316 U.S. at 163.

The principles necessitating this result in *Georgia* are as applicable to foreign governmental entities as they are to states. When foreign governments enter the U.S. market in a proprietary or commercial capacity, they are equally vulnerable to anticompetitive practices. Neither domestic states nor foreign governments are able to protect themselves adequately through the enactment of domestic legislation. As a practical matter, any such legislation would be ineffective in securing jurisdiction over individuals in the United States who are responsible for the injury. Even if jurisdiction could be obtained, difficulties in

obtaining evidence of violations originating in this country are likely to prove insurmountable. Finally, because the remedies of the United States antitrust laws are not, and were not intended to be, exclusive, the availability of a domestic remedy is immaterial.

For many products, lack of an alternative source of supply will require a foreign government to deal with sellers located in the United States. In these situations, the U.S.-based seller can retain control over the terms and conditions of sale. This control will compound the difficulties of attempting to apply remedies available only with reference to the law of the foreign purchaser. For vital products such as medicines, foreign governments may be compelled to make purchases from sellers whom they suspect of engaging in price fixing conspiracies.

Since the decision in *Georgia* indicates that government entities do qualify as persons, *United States v. Cooper Corp.*, 312 U.S. 600 (1941) cannot stand for the proposition that *no* government entity can proceed under the antitrust laws. Congress intended to exclude only the United States under Section 4 because the statutory scheme provided the United States government with alternative remedies and obligations. In explaining Section 2 of his bill (the predecessor of Section 4 of the Clayton Act), Senator Sherman stated that in view of these exclusive remedies, the United States was precluded from invoking the civil damage remedy.

> *It is the second [damages] section that gives the civil suit, and that is not to be prosecuted at all by the United States or by the officers of the United States.* The first section deals with the public injury to the people of the United States and there the suit is brought in the name of the United States to restrain, limit, and control such arrangements so far as they are illegal. *The second section gives a private remedy to every person injured.* It seems to me the two sections are as distinct from each other as possible.
> 21 CONG. REC. 2563 (1890) (emphasis added).

No other sovereign, foreign or domestic, could have been excluded under Senator Sherman's explanation because no other sovereign had access to these other remedies. Congress, therefore, intended that "every" injured party *except* the United States be afforded the remedy of civil damages.

Cooper turned upon the perceived obligation of the sovereign to enforce its own statutes within its own territories without reference to any added stimulus provided by the prospect of recovering damages. Foreign governments have no equivalent duty; indeed, they have no authority under which to enforce the statutes of the United States.

In both *Georgia* and *Cooper*, the Court gave specific guidance with respect to the factors to be utilized in determining whether a sovereign qualifies as a "person" under Section 4 of the Clayton Act. The primary aids cited by the Court are (i) the executive interpretation of the statutes, (ii) purpose and subject matter, (iii) legislative history, and (iv) context. Each dictates that foreign governments be permitted to sue.

(i) Interpretation by the executive branch has been supplied by the participation of the United States as *amicus curiae* in full support of the proposition that foreign states are persons with standing to maintain suit.

(ii) The statute has two principle objectives: to provide an adequate remedy for those injured in their business or property by violation of the antitrust laws; and to serve as a deterrent to violators by threat of remedial lawsuits. Both purposes would be subverted by exclusion of foreign government plaintiffs. As a remedial statute, the Clayton Act is to be construed broadly and not in a fashion which would frustrate its underlying objectives.

(iii) The legislative history establishes that the anti-competitive activities described in the Act were prohibited under the common law. Because these activities usually took place in interstate or foreign commerce rather than in a local setting, victims of those practices often lacked access to courts capable of supplying an adequate remedy. It was the intent of Congress to correct this situation by opening the federal courts to all who were injured. There is no indication that persons previously possessing common law rights were to be deprived of a remedy under the antitrust laws.

(iv) The context in which the term "person" appears in the Clayton Act further supports foreign government standing.

a. Section 1, 15 U.S.C. §12 (1970) is couched in inclusionary, not exclusionary, terms. The word "include" indicates that specific references following it are by way of example and not by way of limitation.

b. Corporations established under foreign law are explicitly covered within the definition of those "persons" whose interests are to be protected. It would be illogical to permit a government corporation recovery under the antitrust laws while denying recovery to the government itself. To make standing depend on whether a government enters the market in its own name or through the medium of a government-owned corporation would be a triumph of form over substance. It would penalize our allies and traditional trading partners while rewarding communist and socialist countries which purchase primarily through state trading corporations or other government corporations.

c. Section 4 uses the language "any person" to describe the essentially unlimited scope of rights being conferred. If Congress had intended to exclude a class of entities from the coverage of the Clayton Act, it could hardly have chosen two words more surely calculated to produce the very opposite impression.

d. The definition of "commerce" in Section 1 of the Clayton Act refers three times to commerce "with foreign nations." Congress evidenced an intent to protect such commerce. It would undermine this intent to read out of the statute that portion of foreign commerce attributable to foreign government purchases.

Petitioner-defendants' argument is based principally upon their assertion that the legislative climate — not the legislative history — shows a jingoistic proclivity on the part of some members of the 51st Congress to favor American interests over foreign interests. Petitioners glean this beggar-thy-neighbor attitude from speeches in political gatherings outside of the Congress and debates involving unrelated legislation. Pet. Br. at 11-13. The plain language of the antitrust acts belies this alleged legislative intent to provide an exclusively domestic remedy. The Acts expressly confer standing to sue on *foreign* corporations. It is not possible to reconcile Congress' action in including foreign purchasers in the definition of "person" with petitioners' assertion of a chauvinistic congressional intent to protect only domestic interests. Petitioners' corollary argument that the issue before this Court should be left to the future consideration of Congress is inapposite because foreign government standing comports with congressional intent.

Attempts to buttress the legislative environment argument with reference to the Statutory Revision of 1874 or the narrow holding of *United States v. Fox*, 94 U.S. 315 (1876), are equally unavailing. The 1874 Revised Statute was not intended by Congress to change the prevailing presumption that sovereign entities were included within the word "person" unless expressly excluded. A member of the law revision committee emphasized that Congress did not intend to make "any changes in existing law." 2 CONG. REC. 820 (1874) (remarks of Rep. E. R. Hoar).

Fox did not pronounce an exclusionary rule of general applicability, nor did it state a rule of law in New York that sovereigns were not "persons" within the definition of that term. To the contrary, cases both before and after *Fox*, including one case decided the year before the Sherman Act was enacted, *Republic of Honduras v. Soto*, 112 N.Y. 310, 19 N.E. 845 (1889), held that foreign sovereigns were within a general definition of "person." In fact, this Court's decision in *Stanley v. Schwalby*, 147 U.S. 508 (1893), flatly contradicts petitioners' contention that the *Fox* case "reflected general law." Pet. Br. at 21.

An inclusionary interpretation protects domestic consumers and producers. To deprive foreign states of a remedy would undermine "the effective enforcement of the antitrust laws," leaving unchecked conspiracies in foreign sales that "would certainly have an adverse effect on domestic commerce." *In re Antibiotic Antitrust Actions*, App. at A-7, 8.

To deny standing to foreign governments would be to class them as the *only* category of purchasers unable to recover for antitrust violations perpetrated within the United States. So unfair a result would be an embarrassment to the relations between foreign governments and the United States.

ARGUMENT

I. IN *GEORGIA V. EVANS*, THE COURT AFFIRMED THAT GOVERNMENT ENTITIES ARE PERSONS UNDER SECTION 4 OF THE CLAYTON ACT. THE SAME CONSIDERATIONS THAT APPLIED TO STATES IN *GEORGIA* APPLY TO FOREIGN GOVERNMENTS.

A. Like Domestic States And Other Commercial Purchasers, Foreign Governments Lack Adequate Means of Redress for Anticompetitive Activities In The United States, Except For That Provided By The Clayton Act.

In *Georgia v. Evans*, 316 U.S. 159 (1942), this Court held that a state had standing to sue under the Clayton Act. In finding that a government entity was a "person", the Court recognized that if a government is unable to apply sovereign power to prevent being victimized it becomes a mere "purchaser of commodities shipped in interstate commerce." *Id.* at 162. Recognizing that the remedies of injunction, seizure and criminal sanctions were made available only to the United States, the Court found that a state would be deprived of any effective remedy when mulcted by a violator of the antitrust laws unless it were able to apply the remedies granted persons. As a commercial purchaser, the foreign state is in the same predicament as a domestic state that purchases goods moving in the interstate or foreign commerce of the United States. Neither is able to assert any special prerogatives of its sovereign power to prevent commercial abuses.[1]

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[1] At the time the Sherman Act was passed, it was a settled rule of law that:

> Statutes derive their force from the authority of the legislature which enacts them. . . . It is only within these

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> In their commercial capacity, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens.
> *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976).[2]

This principle has its antecedents in root cases decided at least as early as 1824.[3]

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> boundaries that the legislature is lawmaker, that its laws govern people, that they operate of their own vigor upon any subject. No other laws have effect there as statutes.
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> J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §12 at 11 (1st ed. 1891).

[2]The principle that a foreign country which enters the commercial market is to be treated as any other commercial party has been codified in the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2894. Under the Act, a foreign state can be sued when it undertakes commercial activity having an impact in the United States. It would be unfair to deny a foreign state the right to sue when it is injured, while subjecting that same state to suit as a defendant when it undertakes such commercial activity. The latter is more than a theoretical risk. Since passage of the Act, the NLRB held federal labor laws applicable to a government corporation of respondent India. *State Bank of India and Chicago Joint Board, AC & TWU, AFL-CIO*, 229 NLRB No. 137 (May 20, 1977). Similarly, the SEC obtained consent order jurisdiction over Pertamina, Indonesia's wholly-owned government oil company. *SEC v. Indonesian Enterprises, Inc.*, Civ. Action No. 77 Civ. 499 (S.D.N.Y. 1977).

[3]*Bank of United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824). And in *Ohio v. Helvering*, 292 U.S. 360, 369 (1934), this Court said: "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader. . . ."

While older cases applied the now discarded absolute theory of sovereign immunity to foreign governments as defendants, the sovereign's right of access as plaintiff has been recognized consistently.

Petitioners, however, have asserted that, unlike states, foreign governments are able to protect themselves against anticompetitive practices that take place outside the limit of their sovereignty through the enactment of domestic legislation.[4] Pet. Br. at 31. This assertion is incorrect from a practical and a jurisdictional viewpoint.

As a practical matter, foreign governments may have no alternative but to purchase from sources in the United States because they lack any realistic substitute source for the required goods or services. Thus, foreign purchasers, of necessity, may be forced to purchase essential commodities from sellers engaged in violation of United States antitrust laws. When this occurs, a foreign government's domestic legislation designed to insure that purchases are made in a competitive manner will be ineffective.[5]

Personal jurisdiction by foreign states over conspirators who need never leave the United States would be difficult, if not impossible, to acquire. Even if jurisdiction could be obtained, problems associated with obtaining evidence necessary to prosecute the action and with the production

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[4]Petitioners point out that some foreign governments have their own antitrust laws and thus have or could have some type of remedy. Pet. Br. at 31. States also have their own antitrust laws; and some had them at the time the *Georgia* decision was rendered in 1942.

[5]The practical and jurisdictional difficulties of obtaining redress by reference to local foreign laws is illustrated by a March 1965 letter from Mr. Amerding, a Pfizer executive, to all Pfizer Country Managers pointing out that:

> [T]he logical place to exert pressure is the country in which the supplier of the original material is located, and it is interesting that these are precisely the countries (with the exception of Italy) where our patent position is most effective. Appendix at A-153.

Moreover, price fixing on foreign government tenders and foreign territorial allocations can take place without the principal actors ever leaving corporate headquarters in the United States. *See, e.g.*, App. at A-158-167 (price fixing); App. at A-152 (territorial allocation); App. at A-173-176 (customer and product allocations).

of witnesses at trial abroad would be close to insurmountable. Finally, any remedies abroad — assuming jurisdictional and trial difficulties could be overcome — would be limited.[6] Injunctions issued by foreign sovereign courts would be difficult to enforce against American-based monopolists who maintain no presence in the foreign country.

B. The Decision In *United States v. Cooper Corp.* Is Supported By Express Congressional Intent To Exclude Only The United States From The Remedy Provided In Section 4.

The decision in *United States v. Cooper Corp.* 312 U.S. 600 (1941), recognizes a unique exception to the general rule that all commercial purchasers be afforded a remedy when damaged by an antitrust violation. This exception was deliberate and was discussed with great particularity by Senator Sherman in the floor debates relating to the Sherman Act. He noted that the United States was excluded from Section 2, the civil damage section,[7] (which later

[6]Foreign judgments could be satisfied by payment in local and frequently inconvertible currencies. The governmental purchaser, however, may have had to relinquish scarce foreign exchange at the time of purchase if the U.S. seller demanded payment in dollars. The receipt of damages in local currency would not remedy the loss of dollars in this situation.

[7]The civil damages section in the bill referred to by Senator Sherman was virtually identical to Section 4 of the Clayton Act, except that it then provided for double instead of treble damages. It read:

> That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this act, twice the amount of damages

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became Section 4 of the Clayton Act) since the United States had alternative remedies under another section of the bill. 21 CONG. REC. 2563 (1890). The United States was limited to the remedies provided under the section which dealt "with the public injury to the people of the United States." *Id.* Even though the civil damages section was "not to be prosecuted at all by the United States," Senator Sherman declared that this section gave a private remedy to "every person" injured. *Id.* This could mean *only* that *all* persons, including every foreign and domestic state purchasing in its proprietary capacity, except the United States, had standing to invoke the civil damages section.[8]

The wisdom or desirability of excluding the United States from the damage provision of the antitrust laws has been questioned, but there is no doubt that it was intentional. Moreover, the decision to exclude the United States could be rationalized since the government had the duty to maintain confidence in its statutory system by bringing actions to prevent violations without regard to remedial compensation.[9] This obligation, however, applies to the United States, and the United States *alone*.

In *Georgia*, this Court further distinguished the result in *Cooper*, noting that Congress withheld the damage remedy because "the United States has chosen for itself three [other] potent weapons for enforcing the Act . . . ." 316 U.S. at 161. The United States, therefore, was able to utilize its sovereign power for self-protection. Possessing no similar

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> sustained and the costs of the suit, together with a reasonable attorney's fee.

21 CONG. REC. 2563 (1890) (remarks of Senator Sherman).

[8]At the time it rendered its decision in *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Court was well aware of the legislative mandate since Senator Sherman's statement was quoted in the brief of respondent, Cooper Corp. Brief for Respondent at 24-25.

[9]*See, e.g.*, S. R. REP. NO. 619, 84th Cong., 1st Sess. (1955).

arsenal of weapons, domestic and foreign states were never intended to, and do not, come within the exception created in the case of the United States.

II. THE AIDS GIVEN BY THIS COURT FOR CONSTRUING "PERSON" REQUIRE AN INCLUSIVE INTERPRETATION.

In *Georgia*, the Court enunciated criteria to be employed in determining the intent of Congress in the use of the term "person" in Section 4 of the Clayton Act.

> The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by use of the term, to bring state *or nation* within the scope of the law. 312 U.S. at 604-605.
> 316 U.S. at 161 (emphasis added).

The specific reference to bringing a "nation" within the scope of the law suggests again that the *Georgia* decision contemplated standing for foriegn countries. Defendants are mistaken in attempting to limit the *Georgia* decision solely to domestic states.

A. Executive Interpretation Of The Statute Supports Standing.

The aid of executive interpretation has been provided through the appearance, *amicus curiae*, after consultation with the Department of State, of the Department of Justice in support of the right of foreign governments to maintain remedial damage actions because they are "persons" within the intended coverage of the Act.

B. The Context In Which The Word "Person" Appears In The Antitrust Laws Supports Foreign Government Standing.

1. Section 1 Is Inclusive Rather Than Restrictive in Character.

The definition of "person" in Section 1 provides that the defined term "shall be deemed to include" certain legal entities. These are the words of inclusion, *not* exclusion. They convey the meaning that there are other entities encompassed by the definition, although not specifically enumerated. As this Court stated in *Federal Land Bank v. Bismark Co.*, 314 U.S. 95 (1941):[10]

> [T]he term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle. 314 U.S. at 99-100.

2. Denial of Standing to Foreign Governments While Permitting Foreign Corporations Owned in Whole or in Part by the Governments to Maintain Suit Would Create an Unjustified Anomaly.

The definition of "person" in the Clayton Act expressly includes "corporations . . . existing under . . . the laws of any foreign country." Neither the Act nor its legislative

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[10] *California v. United States*, 320 U.S. 577 (1944), concerned the definition of "person" under the Shipping Act of 1916, 46 U.S.C. §801, which parallels the definition of "person" under Section 1 of the Clayton Act. The question was whether a state and a city were included within the definition:

> We need not waste time on useless generalities about the statutory construction in order to conclude that entities other than technical corporations, partnerships and associations are 'included' among the 'persons' to whom the Shipping Act applies . . .
> 320 U.S. at 585.

history excludes from this definition foreign corporations owned in whole or in part by a foreign sovereign. Thus, to the extent that the purchases of antibiotics involved in this case had been made by plaintiffs through government owned corporate entities, rather than through agencies or departments of the government, plaintiffs unquestionably would have a remedy.

It is not sound law to conclude that the protection of the antitrust laws should extend to a foreign state purchasing an item through a corporation owned by that state, but should not extend to the same state, purchasing the same item, on the same terms, through an unincorporated agency or department.[11] The decision to procure either through a corporate or non-corporate entity is only a matter of the foreign government's own administrative convenience.[12] It logically should have no legal relevance to the rights of that government under our antitrust laws.[13]

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[11]If it were held that only procurement by a foreign sovereign through a corporate entity were entitled to the protection of the antitrust laws, illogical consequences would ensue: for example, if manufacturers of jet aircraft conspired to fix the prices of planes sold to the British Royal Air Force [RAF] and to British Airways [BA], the RAF, as an agency of the British Government, would have no remedy, but BA, being a government owned corporation, could recover damages.

[12]In *Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940), the Court noted:

> So far as the powers of a national bank to pledge its assets are concerned, the form which the Government takes — whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation — is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires*. *Id.* at 523.

[13]The attempt to reconcile the anomaly by arguing that a foreign corporation owned by the sovereign is *not* a "person" finds no support

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Drawing a legal distinction between purchases by a sovereign made through a corporate as opposed to a non-corporate entity would reward communist bloc countries since they traditionally make their purchases through state trading corporations, and would penalize our Western allies since they usually purchase directly.[14]

Petitioners argue that there is precedent for distinguishing between acts of a foreign government and a foreign corporation owned by that government, citing Section 4(a) of the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, §4(a), 90 Stat. 2894. The Act, however, draws absolutely no distinction between a foreign government and a foreign corporation with respect to its underlying purpose — immunity from suit. Section 4(a) merely provides that the sovereign is not subject to punitive damages.

3. Congress Evidenced a Specific Concern With Foreign Commerce and Foreign Nations In the Language of the Sherman Act.

The term "foreign nations" is used repeatedly in the Sherman and Clayton Acts to describe the foreign com-

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[13](continued)
either in the text of the Act or in its legislative history. It also creates a legal morass; the courts in every case would be required to determine what percentage of ownership or what elements of control make the corporation the legal equivalent of the foreign sovereign for purposes of Section 4. If a mechanical rule of 51% government ownership were adopted illogical distinctions would emerge: Japan Air Lines (44.34% government owned) would be a "person" but Air France (70% government owned) would not be; Alfa Romeo (49%) would be, but Renault (89.6%) would not be.

[14]S. PISAR, COEXISTENCE & COMMERCE, 141, 142 (1970); *cf. Amtorg Trading Corp. v. United States*, 71 F.2d 524, 528-529 (C.C.P.A. 1934).

merce which the antitrust laws seek to protect.[15] The Eighth Circuit observed that:

> When Congress enacted the antitrust laws, it expressly recognized that illegal contracts, conspiracies and monopolies by domestic firms may affect commerce with other nations.
> Pet. App. B-7.

This recognition is inconsistent with any suggestion that Congress would except foreign states from the class of persons accorded a right of action under Section 4. To do so would undermine the effectiveness of the antitrust laws in an area that Congress deemed essential to protect.[16]

4. The Reference in Section 4 of the Clayton Act to the Extension of the Remedy to "Any Person" Is Inconsistent With an Intent by Congress to Deprive Foreign Governments of a Remedy.

Section 4 extends the damage remedy to "any person". The comprehensive meaning intended by Congress in its use of the word "any" is evidenced by Senator Sherman's

[15] As noted by the Eighth Circuit, Pet. App. B-7 n.7, Section 1 of the Sherman Act declares illegal contracts, combinations or conspiracies "in restraint of trade or commerce . . . with foreign *nations*." Act of July 2, 1890, ch. 647, §1, 26 Stat. 209 (emphasis added). Similarly, Section 2 proscribes monopolizing and conspiring and attempting to monopolize commerce "with foreign *nations*." (emphasis added). Section 1 of the Clayton Act expressly refers three times to commerce "with foreign *nations*" in the definition of the term "commerce." Act of October 15, 1914, ch. 323, §1, 38 Stat. 730 (emphasis added).

[16] Senator Hoar said that the "great thing that this bill does" is to protect the "international and interstate commerce" of the United States. 21 CONG. REC. 3152 (1890). As author of the final version of Section 7 of the Sherman Act he emphasized that Congress had "af-

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statement that "every person injured" was to have a remedy. 21 CONG. REC. 2563 (1890). Senator Davis said that a "universal right of action" was being enacted. 21 CONG. REC. 2612 (1890). Petitioners, nevertheless, have argued that Congress legislated in terms which it understood to exclude foreign governments as entities privileged to maintain suit. Pet. Br. at 10. The legislators' use of such expansive language to describe those who may seek redress negates petitioners' assertion. Congress did not state that the Act applied to any person except for certain classes or categories of purchasers.[17] The term "any person" is written without restriction and, in the absence of any limitation, the Court should not impose one.[18]

[16] (continued)
firmed the old doctrine of the common law in regard to *all* interstate and international commercial transactions." 21 CONG. REC. 3146 (1890) (emphasis added) (remarks of Senator Hoar). Senator Sherman wanted to attack all unlawful combinations which "interfere with our foreign . . . commerce." 21 CONG. REC. 2456 (1890).

[17] The specific intent of Congress not to include the United States was discussed in Section I(B), *supra*.

[18] Exemptions from the antitrust laws will not be found by implication, but must be stated expressly by Congress. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). Even express exemptions will be construed narrowly so as not to limit or repeal the scope of the antitrust laws more than is absolutely necessary. *Carnation Milk Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966). *See United States v. American Trucking Ass'n.*, 310 U.S. 534, 543 (1940):

> Even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed the purpose rather than the literal words.

C. The Subject Matter and Purpose Of The Antitrust Laws Support Standing.

An inclusive interpretation is required to implement the broad scope of the law intended by Congress which "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). This Court has noted that:

> As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.
> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360 (1933).

In *D.R. Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U.S. 165 (1915), the Court declared that the remedies provided to enforce these "broad conceptions of public policy" were to be "co-extensive" with them. *Id.* at 174. Accordingly:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . [It protects] *all* who are made victims of the forbidden practice by whomever they may be perpetrated.
> *Mondeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (emphasis added).

1. The Remedial Nature of Section 4 Requires a Liberal Construction Which Would Include Foreign States.

Section 4 is a remedial provision.[19] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 (1977); *City of Atlanta v. Chattanooga Foundry & Pipe Co.*, 101 F. 900, 906 (E.D. Tenn. 1900), *rev'd on other grounds*, 127 F. 23 (6th Cir. 1903), *aff'd.*, 203 U.S. 390 (1906). Remedial statutes "should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Westinghouse Electric Corp. v. Pacific Gas and Electric Co.*, 326 F.2d 575 (9th Cir. 1964),[20] *quoting Scarborough v. Atlantic Coast Line R.R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949). A construction which restricts the application of Section 4 in the case of only one important class of direct purchaser is incompatible with its remedial character.

2. To Deny Standing to Foreign States Would Weaken the Deterrent Value of The Law.

A principle purpose of the antitrust laws is to deter anticompetitive conduct. The threat of treble damages has been recognized as an effective means of discouraging violations. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), this Court stated:

> [T]he purposes of the antitrust laws are best served by insuring that the private action will be an

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[19] To quote Senator Sherman:

> Now Mr. President, what is this bill? A remedial statute to enforce by civil process in the courts of the United States the common law against monopolies . . . .
> 21 CONG. REC. 2461 (1890).

[20] "How is such a law to be construed? Liberally, with a view to promote its objects." 21 CONG. REC. 2461 (1890) (remarks of Senator Sherman).

> ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.
> *Id.* at 139.

In the recent case of *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977), the Court noted that Section 4 "is also designed to compensate victims of antitrust violations for their injuries," and "so long as someone redresses the violation" enforcement of the Act would not be weakened. *Id.* at 2075. In the case of foreign government direct purchases, denial of standing would mean that there would be no one to redress the violations.

Sellers would be tempted to fix prices in foreign government tenders if conspiracies were immunized from damage actions. But when Congress has determined that U.S. firms should be immunized from the reach of the antitrust laws viz-a-viz foreign interests, it has said so in explicit terms, and has granted limited immunity subject to carefully specified pre-conditions.[21]

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[21] *See, e.g.*, The Export Trade Act of 1918, 15 U.S.C. §§61 *et seq.* [Webb-Pomerene Act]. Among other requirements, those companies wishing to take advantage of the Act must register with the Federal Trade Commission. Petitioners erroneously contend that the Webb-Pomerene Act confirms a congressional intent in the Sherman Act not to protect foreign consumers or their sovereign government. As noted above, the grant of limited immunity demonstrates a strict control over any departure from the Sherman Act's broad remedial purpose. Whatever Congress' purpose in passing the Webb-Pomerene Act, it can form no relevant basis for determining the intent of Congress some 28 years earlier in passing the Sherman Act. This Court often has observed that it is unsound to rely on subsequent legislation or its legislative history in interpreting a prior statute. *See, e.g., NLRB v. Lion Oil Co.*, 352 U.S. 282, 291 (1957); *Higgins v. Smith*, 308 U.S. 473, 479-80 (1940).

D. The Legislative History of the Antitrust Laws Supports Inclusion.

During the debates which surrounded the passage of the Sherman Act, its sponsors declared that the bill "does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." 21 CONG. REC. 2456 (1890) (remarks of Senator Sherman); 21 CONG. REC. 3146, 3152 (1890) (remarks of Senator Hoar). Congress recognized that the limited jurisdiction of the state courts would not permit those victimized to reach all miscreants engaged in anticompetitive practices.

In early versions of the Sherman bill, the jurisdiction of the federal courts was added to the jurisdiction which state courts had under the common law. Thus, in commenting on the bill at that time, Senator Edmunds was able to say that the law "gives in the circuit court of the United States the right of anybody to sue who chooses to sue" without depriving him of his alternative remedy "to use in the State courts." 21 CONG. REC. 3148 (1890). Congress sought to supply an alternative forum for those who did not have an adequate forum under the common law; no restriction as to the class of persons entitled to sue at common law was intended.

The constitutionality of opening the federal courts was a significant concern at the time the Sherman bill was introduced. After much debate, Congress concluded, however, that the bill was authorized by the commerce and judicial articles of the Constitution. Senator Sherman noted that the judicial article specifically covers disputes between citizens of the United States and "foreign states, citizens or subjects." 21 CONG. REC. 2460 (1890).

Against this background, it seems apparent that opening the doors of the federal courts was not intended to deprive

foreign states or any other person of their pre-existing common law rights.

1. In 1890, It Was Settled Law That the Word "Person" Appearing in a Statute Granting a New Remedy Presumptively Included Bodies Politic.

Congress' adherence to common law principles as to the wrongs prohibited by the Sherman Act was paralleled by its adherence to terms which "were well known to the law already." 21 CONG. REC. 3148 (1890) (remarks of Senator Edmunds). In 1890, the canons of statutory construction and accepted usage compel the conclusion that the word "person," when used in a statute without further definition, embraced both foreign and domestic states. Thus, contrary to respondents' contention, members of the Judiciary Committee of the 51st Congress in using the word "person" must have been aware that historically the term included sovereign entities.[22]

[22]Petitioners argue that as used in successive drafts of the Sherman Act, "person" meant natural person. They seize on the substitution of "persons" for "citizens" in the final draft of Section 1, which defined types of anticompetitive conduct and provided for suit by the United States. Pet. Br. at 15-16. However, the use of the term "persons" in Section 2 of the Bill, which conferred the private damage action remedy, remained constant through the successive drafts. Senator Sherman stated that "this provision allowing *any party* to sue is of vital importance." 21 CONG. REC. 2569 (1890) (emphasis added). The term "citizen" was used in a later draft of Section 1, in an effort to track language from the Constitution and base the Act in part upon federal diversity jurisdiction.

The revision from "citizens" to "persons" in Section 1 appears to have been made only in order to obtain consistency within the Bill after the diversity language was removed; there is no indication that the term "persons" was meant to be limited to only natural persons.

Petitioners also try to link the terms "person" and "citizen" by straining the legislative history of the Clayton Act in 1914. Pet. Br. at

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The established rule of statutory construction was that a state be included in a statute granting new rights and remedies. At common law, the King could take the benefit of an act of Parliament conferring general rights in general terms even though the act did not expressly mention him. *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1879); *see* 1 W. BLACKSTONE, COMMENTARIES* 262 (1765). In the 1890's, the rule of construction was one of presumptive inclusion:[23]

> It must also be observed that although the state is not to be bound without express words or necessary implication, the same reasons do not apply when the question is as to the right of the state to take the benefit of a new law not expressly made for its advantage. *Here the presumption is rather the other way: and the courts incline to give the government the benefit of new rights and remedies wherever applicable.* When general rights are declared or remedies given by statute, the government is generally to be included, though no named.
>
> BLACK. INTERPRETATION OF LAWS. 98-99 (2d ed. 1896) (emphasis added).

The word "person" would have been understood by Congress to include foreign and domestic statutes both under the existing rule of construction and under the then prevailing judicial interpretations. In *Cotton v. United*

[22](continued)

25. To contend that one Senator's comments evidenced the understanding of the 63rd Congress is at best dubious. It becomes all the more questionable upon review of Senator Walsh's comments, in which he himself indicated in his remarks that his use of the word "citizen" might not be "technically correct." 51 CONG. REC. 13898 (1914).

[23]If foreign governments were to be denied the remedies accorded by Section 4 to "any person," they would be placed in a position inferior to that of other private suitors. *See, e.g., Pierce v. United States*, 255 U.S. 398, 402 (1921), *quoting, Rex v. Woolf*, 2 B & Ald. 609, 611.

States, 52 U.S. (11 How.) 229 (1850), the Court had held that every sovereign is an artificial person:[24]

> *Every sovereign State is of necessity a body politic, or artificial person*, and as such capable of making contracts and holding property. . . . It would present a strange anomaly, indeed, if having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. . . . [A]s a corporation or body politic they may bring suits to enforce their contracts and protect their property . . . .
> *Id.* at 231 (emphasis added).[25]

By the date of passage of the Sherman Act, this principle had become entrenched in the law. Thus, in 1889, the New York Court of Appeals held that a foreign sovereign was a "person" within the meaning of a statute requiring non-resident "persons" to provide security for costs. *Republic of Honduras v. Soto*, 112 N.Y. 310 (1889).[26] The state court noted first the fundamental rule of comity acknowledged by

[24] 1 W. BLACKSTONE, COMMENTARIES * 123 (1765), observed that the word "person" included political entities:

> Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

The courts of this country early recognized the essentially corporate nature of government. *Respublica v. Sweers*, 1 U.S. (1 Dall.) 41, 44 (1779).

[25] *Accord, United States v. Hughes*, 52 U.S. (11 How.) 552, 568 (1850); *Dugan v. United States*, 16 U.S. (2 Wheat.) 172, 181 (1818).

[26] The statute in question expressly mentioned foreign corporations, as does Section 1 of the Clayton Act, in addition to other "person[s] residing without the state." The court did not construe the reference to foreign corporations as a limitation on the meaning of the word "person."

this Court in *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870).[27] It then considered the long-prevailing rule of international law that sovereigns were "persons" within the definition of that term with the legal capacity to maintain actions in their own right.[28] The court concluded that the word "person" was used in the statute "as comprising all legal entities" including specifically the foreign sovereign. 112 N.Y. at 312.

2. Since Passage of the Sherman Act Foreign Sovereigns Have Continued to be Granted Access to United States Courts on the Same Basis as Any Other Person.

In the intervening years between the passage of the Sherman Act and the enactment of Section 4 of the Clayton Act, foreign governmental entities brought a number of anti-

[27] Foreign courts also entertained suits by other foreign sovereigns. *E.g., King of Spain v. Hullett*, 1 D & Cl. 169, 174-176 (1828). In sustaining the right of the Spanish Government to bring a bill in Chancery for an accounting to recover certain monies, the House of Lords per Lords Redesdale and Lyndhurst stated:

> Why should he not have his remedy here as well as any other foreigner? . . . I have no doubt but a foreign sovereign may sue in this country, otherwise there would be a right without a remedy . . . . There is no ground for the notion, that a foreign sovereign cannot sue in the courts of this country. It appears to me clear that he can sue, and it would be monstrous injustice if he could not.

As the Court noted in *The Sapphire*, the United States had availed itself of the right to sue in the courts of other countries.

[28] Previously, it was stated in *Republic of Mexico v. Arangoiz*, 5 Duer 634 (N.Y. 1856):

> [E]very state is a person, an artificial person, in a more extensive and far higher sense than an ordinary corporation . . . . The definition given by other writers on the law of nations, is substantially the same, and, indeed, it is upon the truth of this definition that the whole science of international law is founded . . . .
> *Id.* at 637.

trust-type unfair competition suits for damages and injunctive relief against American companies in U.S. courts. For example, in *French Republic v. Saratoga Vichy Co.*, 191 U.S. 427, 433 (1903), the Court noted that where a government is suing for the prosecution of a private and proprietary right as opposed to a public or governmental right, it is in the same position as any other natural or juristic person with the same rights and subject to the same defenses.[29] Since the passage of the Clayton Act, this Court reaffirmed that foreign sovereign plaintiffs in their private corporate capacity are to be regarded no differently than other persons.

> A foreign sovereign plaintiff should so far as the thing can be done be put in the same position as a body corporate.
> *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134-135 n.2, (1938),[30] *quoting Costa Rica v. Erlanger*, 1 Ch. D. 171, 1974 (1875)

Thus, the historical recognition of sovereigns as artificial persons has remained constant. Congress never has believed other than that foreign governments are entitled to proceed under remedial statutes.

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[29]*See also La Republique v. Schultz*, 94 F. 500 (S.D.N.Y. 1899); *City of Carlsbad v. Kutnow*, 68 F. 794 (S.D.N.Y. 1895); *City of Carlsbad v. Schultz*, 78 F. 468 (S.D.N.Y. 1897).

[30]In addition to *Erlanger*, the Court cited a number of cases, including *Republic of Honduras v. Soto*, 112 N.Y. 310 (1889), that reflect this long-standing judicial attitude.

A foreign state has been accorded standing when asserting claims growing out of its commercial activities, even where it brought suit under a federal statute that enumerated those who could sue, but did not include foreign states. *Swiss Confederation v. United States*, 70 F. Supp. 235 (Ct. Co. 1947), *cert. denied*, 332 U.S. 815 (1947). *See also Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 399 (2d Cir. 1927), *cert. denied*, 275 U.S. 571 (1927). The courts have not restricted governments to the more traditional judicial forums. Thus, in *Lake Ontario Land Development v. FPC*, 212 F.2d 227 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 1015 (1954), the court held that the Government of Canada was a proper party to intervene in an FPC proceeding. The word "person" had not been defined in 18 C.F.R. §1 to include foreign sovereigns among those parties entitled to intervene.

III. PETITIONERS' ARGUMENTS FAIL TO SUPPORT AN EXCLUSIVE INTERPRETATION OF "PERSON."

Petitioners purport to find in the legislative atmosphere of the 1890's an intent to favor domestic interests to the exclusion of foreign. From this climate they argue that Congress would not have intended to include foreign states as among those intended to benefit from the remedial provisions of the Sherman Act. They also argue that an isolated decision interpreting a state Statute of Wills and the confused 1872 Revisors' Note preceding the 1874 Revised Statutes somehow are translated into a Congressional understanding that foreign governments be disqualified as "persons." Even these weak arguments are defective.[31]

A. Petitioners' Argument That The Legislative Climate Was Hostile To Foreign Interests Is Refuted By The Text Of The Act And Primary Legislative Sources.

The text of the Sherman Act refutes petitioners' suggestion of a jingoistic Congressional intent to protect only domestic interests. Congress expressly conferred standing to sue on "foreign corporations" and throughout the Act repeatedly expressed its concern with foreign commerce and trade with foreign nations. See Section II B 3, *supra*. Petitioners simply are in error in asserting that Congress confined its concern to American victims of antitrust violations.

Petitioners' reliance on off-the-floor remarks at political gatherings or remarks concerning the McKinley Tariff Act

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[31]Petitioners argue that non-use by foreign governments of the antitrust laws' remedial provisions gives rise to an assumption that a remedy did not exist in the first place or that it had atrophied from lack of use. Section 4 simply conferred the right to a remedy on all persons damaged by violation of the antitrust laws. No obligation to use the remedy ever was implied nor does non-use affect its availability. *See United States v. Wise*, 370 U.S. 405, 415 (1962).

— a statute wholly unrelated to the Sherman Act — is misplaced.[32] Remarks made *on* the floor concerning the specific legislation at issue here reflect a congressional recognition not only that international commerce was being debilitated by trusts and monopolies but also that a sweeping remedy was needed to combat the evil to be supressed by the Sherman Act. Senator Hoar described the Act as affirming old common law doctrines applicable to "all interstate and international commercial transactions." 21 CONG. REC. 3146 (1890).

Senator Edmonds, a principal draftsman of the final bill, declared that to suppress the detrimental effects of the trusts, it was the purpose of the bill to go just as far as "Congress had the power to go in breaking up these great monopolies that exist to the detriment and injury of mankind *in this country and in every other.*" 21 CONG. REC. 2727 (1890) (emphasis added). To be assured that the objects of the legislation were fulfilled, Congress created a "universal right of action", 21 CONG. REC. at 2612 (remarks of Senator Davis) for the "great class of persons who might be injured . . . ." 21 CONG. REC. at 2612 (remarks of Senator Reagan). *See also* Section II C, *supra*.[33]

[32]Obviously, a tariff act is designed to protect domestic interests, and by its nature is not intended to benefit foreigners. If petitioners' thesis were to be accepted, any legislation passed by a Congress which also enacted tariff legislation could be construed against foreign interests.

[33]The United States has urged other countries to take steps "which will best reduce obstacles to and restrictions upon international trade" and which will "eliminate unfair trade practices" in international trade. 22 U.S.C. §286k (1970). The concepts have been incorporated in bilateral treaties. *See, e.g., Federal Republic of Germany*, 7 U.S.T. 1858-59, and in Executive Branch participation in international forums. At the United Nations Seventh Special Session, then Secretary of State Kissinger stated:

> The United States therefore believes that the time has come for the international community to articulate standards of conduct for both enterprises and governments . . . .

B. The 1874 "Revised" Statute Was Not Intended By Congress To Exclude Bodies Politic By Implication.

Petitioners contend that the general interpretive statute of 1871,[34] which had defined the word "person" to include "bodies politic and corporate," was revised by Congress in 1874 to remove the reference to "bodies politic" and thereby manifested a Congressional intent to exclude foreign governments from the meaning of "person" in Section 4 of the Clayton Act. Assertedly, this deletion was based upon a recommendation reported to Congress by the Commissioners to whom Congress had delegated the task of revising and consolidating the existing federal laws.[35]

[33](continued)

> Laws against restrictive business practices must be developed, better coordinated among countries, and enforced.
>
> Address by Secretary of State Henry A. Kissinger before the Seventh Special Session of the U.N. General Assembly, Sept. 1, 1975.

See generally Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 8 LAW & POL. INT'L BUS. 895 (1976). It would seem strange indeed for the United States to encourage other nations to provide a legal mechanism to prevent restrictive trade practices while simultaneously denying those nations access to our courts to protest against U.S.-originated abuses.

[34]Act of Feb. 25, 1871, ch. 61, §2, 16 Stat. 431.

[35]1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 19 (1872) (REVISER'S NOTES):

> Substantially the same as section 2 of the act of February 25, 1871, ch. 16, Stat. at L., substituting at the commencement of the words "In . . . 1871," for "That in all acts hereafter passed;" also, substituting the words "partnerships and corporations" for "bodies politic and corporate." The reasons for the latter change are that partnerships ought to be included; and that if the phrase "bodies politic" is precisely equivalent to "corporations," it

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To be consistent in their position regarding the 1874 "revision", petitioners necessarily must contend that the Court decided incorrectly the following cases in which a political entity has been held to be a "person" within the purview of the Clayton Act and other federal statutes: *South Carolina v. United States*, 199 U.S. 437 (1905); *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U.S. 390 (1906); *Ohio v. Helvering*, 292 U.S. 360 (1934); *Helvering v. Stockholm Enskilda Bank*, 293 U.S. 84 (1934); *Nardone v. United States*, 302 U.S. 379 (1937); *Georgia v. Evans*, 316 U.S. 159 (1942); *California v. United States*, 320 U.S. 577 (1944); *cf. Far East Conference v. United States*, 342 U.S. 570 (1952); *Sims v. United States*, 359 U.S. 108 (1959). This enumeration does not begin to take into account the many lower court cases that have arrived at the same result. To respondents' knowledge, not once in 103 years has a court held that the 1874 "revised" statute cited by petitioners divested a governmental body of a remedy accorded to "any person." It is unlikely that all of these decisions would have overlooked this "revision" or would have disregarded its assertedly dispositive effect.

This Court's historical reluctance to look to the Revised Statutes as a source of "new law" is perhaps best explained by the fact that Congress had no intent whatsoever to make any changes in the law with their enactment. That Congress did not contemplate the slightest modification of existing law stands out clearly in the debates accompanying passage

[35](continued)
is redundant; but if, on the contrary, "body politic" is somewhat broader, and should be understood to include a government, such as a State, while "corporation" should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word "person," to take care that States, Territories, foreign governments, & c., appear to be excluded.

of the Revised Statutes. Representative Poland, a member of the Joint Committee, explained:[36]

[36]Petitioners have been highly selective in relating the history which surrounded the passage of the 1874 revised statutes; they neglected to mention that Congress did not intend the 1874 revision to change the pre-existing law. When the Commission made its report to a joint committee of Congress, "[i]t was the opinion of the joint committee that the commissioners had so changed and amended the statutes that it would be impossible to secure the passage of their revision." Dwan and Feidler, *The Federal Statutes —Their History and Use*, 22 MINN. L. REV. 1008, 1013 (1938). Concluding that Commission's work represented unintended legislation, Congress engaged the services of Thomas Jefferson Durant, a Washington lawyer, to review and eliminate all changes in the law made by the Commission. Congress considered the Durant draft, not the Commission's during the special evening sessions held for the purpose of passing the first omnibus consolidation of the U.S. laws. Among other alternations, Durant removed all of the notes provided in the Commission's draft before the proposed statutes were presented to Congress. *See* UNITED STATES REVISION OF THE LAWS (Report of T. J. Durant 1873).

Mr. Poland noted that in the short time given to complete the job Mr. Durant and the Committee may not have detected every change of language made by the Commissioners in view of the voluminous amount of material. 2 CONG. REC. 820 (1874). Under the circumstances, it is not surprising that the actual language of Section 1 never reverted to that of the 1871 statute; however, it is clear that Congress did not intend to alter the meaning of the definition contained in the earlier version. Indeed, Representative Hoar, a member of the joint committee, declared in unequivocal terms the guiding principle which governed the Committee's work:

> Mr. E.R. Hoar: . . . We are trying as carefully as we possibly can to avoid any changes in existing law.
>
> Mr. Eldredge: Then I understand the committee to take this position, that however absurd a provision may have crept into the existing law, it is not the purpose of the committee to even correct such a thing.
>
> Mr. E.R. Hoar: Exactly. We thought it impossible to go through with this work if we departed from that rule.
> 2 CONG. REC. 823 (1874).

> [T]he Committee on the Revision of the Laws, under the authority of the act, employed Mr. Durant, a lawyer of this city, to take this work [the Commission's draft] and go over it and expunge from it everything in the nature of change; anything that altered the law from what it stood upon the statute-book.
> 2 CONG. REC. 819 (1874) (emphasis added).

It is hard to understand how petitioners can ascertain from this history a Congressional intent to change the law to exclude governmental entities from the definition of the word "person."

The Revisers' Note on which petitioners seek to place reliance is hopelessly ambiguous. It most logically is subject to the interpretation that if future legislators wished to exclude sovereign entities as persons, they must do so expressly. The revisers recognized that the term "corporation" standing alone could be read to include bodies politic. Thus, they admonished future draftsmen employing the word "person" to "take care that States, Territories, foreign governments" are "excluded" specifically if exclusion were the statutory intent.

C. *United States v. Fox* Does Not State A General Exclusionary Rule.

Petitioners urge that *United States v. Fox*, 94 U.S. 315 (1876), stands for the proposition that prior to the Sherman Act sovereigns were not included as persons in the absence of express statutory definition. *Fox* offers precious little support for this contention. The decision held only that under the Statute of Wills, as adopted in New York, the United States was subject to the local rule that the sovereign could not inherit real property located in New York.

Not only was the holding an exception to the prevailing rule including sovereign as persons,[37] see Section II D, *supra*, but *Fox* does not purport to state a general rule of exclusion beyond the New York law on the validity of a devise of land. It does not even state a general rule of New York law on the definition of "person." Both before[38] and after[39] *Fox*, New York courts held that foreign sovereigns were "persons" under New York law.

In *Stanley v. Schwalby*, 147 U.S. 508 (1893), this Court re-affirmed that when a statute uses but does not define the term "person," the sovereign is entitled to claim rights available to any other person:

> Of course, the United States were not bound by the laws of the State, yet the word "person" in the statute would include them as a body politic. . . .
> *Id.* at 517.

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[37] In addition to *Republic of Honduras v. Soto*, 112 N.Y. 310 (1889), the state courts have found a variety of political entities to be included within the word "person" standing alone in a statute. *E.g., County of Lancaster v. Trimble*, 34 Neb. 752, 756 (1892) (a county was held to be a "person" under a statute authorizing "any person" to foreclose a tax lien); *Martin v. State*, 24 Tex. 61, 68 (1859) (the State of Texas was held to be a "person" within the meaning of a criminal statute which prohibited the making of a false entry with the intent to defraud "any person."); *Giddings v. Holter*, 19 Mont. 263, 267 (1897) (United States held to be a person within the terms of covenant of quiet enjoyment which referred to claims by "all and every person or persons"); *State v. Duniway*, 63 Ore. 555, 558-59 (1912) (State can maintain action of ejectment under Code provision. "The words 'any person' specifying who may bring the action, were intended and are broad enough to include artificial as well as natural person."); *Kansas v. Herold*, 9 Kan. 194 (the United States is a 'person' within the meaning of section of "Act to prevent certain trespasses"); *State v. Woram*, 6 Hill 33, 40 Am. Decisions 378, 381 (1843) (State included in the words "any person" in a statute defining payees of promissory notes).

[38] *Republic of Mexico v. Arangoiz*, 5 Duer 634 (N.Y. 1856).

[39] *Republic of Honduras v. Soto*, 112 N.Y. 310 (1889).

In light of these cases, petitioners are incorrect in their assertion that *Fox* implies that sovereigns were presumed to be excluded from the definition of "person."

D. Petitioners' Federalism Argument Is Unsupported And Untenable.

Petitioners have fashioned out of whole cloth a contention that federalism was an important basis of this Court's decision in *Georgia v. Evans*. Pet. Br. at 27-28. Not only was federalism not the basis of the decision in *Georgia*, it was not even mentioned in the opinion. Petitioners' contrivance is based upon a reference to an alternative argument in the Brief of the State of Georgia. The Court did not bother to comment on this alternative.

Petitioners' contention also fails because in *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906), a municipal government's right to sue as a person under Section 7 of the Sherman Act was recognized. Concepts of federalism could not be applicable to this decision involving a lesser governmental entity. Lastly, with respect to purchases made in the United States, a foreign government has no more ability to apply its sovereign power than does a state making purchases in interstate commerce.[40] See Section I(A), *supra*.

CONCLUSION

Petitioners would have this Court disregard the line of cases and legislative pronouncements exhorting an inclusive definition of "person" because they envision possibly severe economic consequences to antitrust conspirators. Pet. Br. at 38. It was not the purpose of Section 4,

[40]Standing is merely a threshhold issue, not a determination of liability. In order to effect any recovery, foreign governments would have to proceed in compliance with the Federal Rules of Civil Procedure to establish an injury to business or property by reason of a violation cognizable under the antitrust laws.

however, to protect wrongdoers but, rather, to require them to account for their ill-gotten gains. The familiar cry of Chicken Little that "the sky is falling" is not novel to the petitioners herein. As long ago as 1904, the Court gave an effective rejoinder to these speculations:

> It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. . . . But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power . . . .
> *Northern Securities Co. v. United States*, 193 U.S. 197, 351 (1904).

The general rule applied by this Court in the antitrust field is that "exemptions from antitrust laws" must be expressly stated by Congress; they will not be found by implication. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). By urging this Court to leave the decision to Congress, defendants are asking this Court to carve out just such an exemption by giving conspirators immunity from damage claims on sales to foreign states.

As the District Court below observed, to deprive foreign states of a remedy would undermine "the effective enforcement of the antitrust laws" leaving unchecked conspiracies in foreign sales that "would certainly have an adverse effect on domestic competition." App. at A-7, 8.

To exempt foreign states *alone* from the protection afforded by the antitrust laws finds no support in the legislative history, the text, the purposes of the law, or in any decided case. It would contravene the interpretation of the law made by that very branch of the government charged with the conduct of the foreign relations of the

United States. It would deprive foreign states of a right which the Eighth Circuit correctly concluded "Congress intended . . . [them] to enjoy . . . ." Pet. App. at B-7. It "would manifest a want of comity." *The Sapphire*, 78 U.S. (11 Wall.) 164, 167 (1870). It would be unjust and unfair. It would work an embarrassment to the relations between the United States and foreign states.

For the above reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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